Supreme Court, U.S.
FILED

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UNITED STATES
SUPREME COURT

RICHARD P. CONSOLE SR.,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE

On Appeal from the United States Tax Court
Docket No. 14972-97
Tax Court Judge : Honorable David Laro
and On Appeal from the United States Court of Appeals
For The Third Circuit
(Nos. 01-4281 and 02-3375)

PETITION FOR A WRIT OF CERTIORARI

RICHARD P. CONSOLE SR.,
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STATEMENT

I express a belief that the 3rd Circuit opinion in this case conflicts with the United States Supreme Court in the cases of:

USA vs. Sells engineering 463 US 418 (1983)

USA vs. Baggott 46 US 476 (1983).

And, **FRCP Rule 6(e)**, that protects tax payer by not allowingthe IRS civil division to use the Grand Jury as a tool for discovery.

QUESTIONS

1.) Does the Third Circuit opinion conflict with the **Sells and Baggott** prohibition that the IRS may not violates Grand Jury Secrecy as set forth in **Fed.R. Crim.P. 6(e).**

2.) Was an evidentiary hearing held that would satisfy the rulings in **Baggott** and **Sells** if the Petitioner was not allowed to question IRS criminal division agents and civil division agents on how the numbers were arrived at.

3.) Was an evidentiary hearing held that would satisfy the rulings in **Baggott** and **Sells** if the Petitioner was not allowed to place into evidence :

1. The IRS criminal division audit based on grand jury testimony that was later photostated by the IRS civil division and passed off as an independent audit.

Or

2. The 1995 memo from the criminal division explaining how the computations were arrived at in its audit based on grand jury testimony and documents.

4.) Could the Tax Court preclude such testimony and such documents from evidence on the basis that such admission **would violate Grand Jury Secrecy.**

PARTIES

1. Richard P. Console, Sr., Petitioner
2. United States of America
3. Commissioner of Internal Revenue

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1. **USA vs. Sells Engineering 463 US418(1983) 5,9,13, 15, 16 ,18.**

2. **USA vs. Baggott 46 US 476 (1983) 5,9,10,13,15,16,18**

3. **FRCP 6:(E) (A) (I) ©) ,5,7,8,9,10,11,18**

4. **US Constitution 5th Amendment Due Process 18**

JURISDICTION

On September 5, 2001 , the US Tax Court ruled that "the IRS did not rely on any Grand Jury material in the formulation of its notice of deficiency" . This is an appeal from a decision in the 3rd Circuit affirming the Tax Court dated July 9, 2003. The Third Circuit en banc affirmed in a decision dated September 12, 2003.

The United States Supreme Court has jurisdiction based upon:

1.US Constitution 5th Amendment Due Process
2.FRCP 6: E (3) (A) (I) ©)
3.The Supreme Court cases of :
a. USA vs. Sells Engineering, 463 U.S. 418 (1983)
b. USA vs. Baggott, 46 U.S. 476 (1983)

In a related case, Tax Payer Console had made a motion for an order to show cause why the notice of deficiency filed by the IRS should not be quashed under **FRCP RULE 6(E)** to the US District Court. On January 25, 1999, District Court Judge Nicholas Politan signed an order which denied the motion, ruling the claims were not justiciable under criminal action No. 91-42 (N.P.). Petitioner filed a notice of appeal on February 24, 1999. The Third Circuit affirmed in an opinion dated April 25, 2000. The Third Circuit en banc affirmed in a decision Dated December 1, 2000. Console lodged a writ of certiorari with the Supreme Court. It was filed by the Supreme Court on April 12, 2001. It was not accepted for review.

STATEMENT OF THE CASE

On January 10,1991 Richard P. Console was indicted in a tax case under 91-42(N.P.).

On August 22, 1995 Richard p. Console pleaded guilty to one count of tax evasion for 1986. The plea agreement provided that Console would refile his taxes for the years 1986, 1987, 1988, 1989 and pay **taxes due if necessary (only) after a Civil Audit(emph. added).** Instead of an independent audit, the civil division provided Console with a Criminal division audit that had been based on Grand Jury subpoenas and testimony.

At negotiations for a plea agreement in August 1995, the Criminal division of the IRS and the Federal prosecutors gave a four page audit to Console and his attorney that was based on grand jury testimony and grand jury subpoenaed documents. This was the criminal division audit that was used to get an indictment against Console in January 1991. US District Court Judge Politan required a civil division audit in

August 1995, which would be independent of the criminal division audit to avoid a **6 (e) violations**, before Console was required to pay any taxes. The plea agreement clearly states that Console shall "file amended personal returns **if necessary after** a **civil audit** (emph added) to pay all taxes and penalties owed". The District Court required an independent civil audit different from the criminal division audit presented to the District Court when the plea agreement was negotiated in 1995.

However, the IRS civil division , that was prohibited from using the Grand Jury testimony and documents, produced the exact same audit in October 1996 that the criminal division audit produced in 1990 which gave rise to the January 1991 criminal indictment against Console . Actually , it was physically the same audit , just signed by a civil agent. The Tax Court did not allow the criminal division audit into evidence at the trial.

Further more, Console attempted to produce the

criminal agent's report detailing how $272,623.50, of Console's reviewed checks were allowed, and $1,246,097.54 were disallowed, along with an extensive explanation of how these decisions were based on particular witnesses who appeared before the Grand Jury and the grand jury subpoenaed documents. The IRS Civil Division claimed that they allowed the same $272,623.50 and disallowed the same $1,246,097.54 of corporate checks in each individual year independent of the IRS criminal division grand Jury investigation. The tax court did not allow the criminal division memo into evidence at the trial.

Console offered these documents to conclusively prove that in October of 1996 the civil division simply signed the criminal division audit which was based on secret grand jury material of 1991.

Console had previously raised the same argument in the US District Court and before the Third Circuit . The Third Circuit opinion of April 25, 2000 stated:

> "The fact that the amount in the notice of deficiency are the same as the amounts calculated in the criminal case does not, **without more** , (emph. added), demonstrate that the former were determined in violation of **Rule 6 (e)** As Console notes the relevant figure on which the amounts in the notice of deficiency are based are laid out in the indictment, which is a public document. In addition , the record included a letter to Console from the IRS agent Manley , who worked on the civil case explaining that his tax deficiency was determined on public record , not in violation of **Rule 6(e)**....accordingly we shall affirm the judgement of the district court."

Console attempted to present evidence to the Tax Court that there was **MORE** .The criminal division memo and the fact that the civil division audit was merely a photostated copy of the attached criminal division audit that had been produced for the indictment in 1991, was strong evidence that the civil division audit was not independently arrived at and that it therefore violated the requirement of **Baggott & Sells.** However the Tax Court did not allow the criminal division memo or the criminal division audit into evidence on the basis that it would be revealing grand jury

materials. Console objected that there could be no evidentiary hearing on whether the civil division had used the grand jury materials for civil purposes, if these matters could not be entered into evidence. At the trial on February 1, 2001 Console stated :

> "My response, Your Honor, is that it does, that it has to(be based on grand jury testimony) , because it is the point of my argument ; that the Grand Jury information that he revealed in that memo is the exact same information in that the Civil Division Agent came up with.
>
> And unless we can reach that point where we can produce evidence , as to what the Grand Jury investigation did produce , that the numbers that they did produce ,then there's no way that the point can be established as to whether the Civil Division actually used the Criminal Division 's resources in violation of the prohibition against Grand Jury Secrecy.

Mr. Ianancone objected, Mr. Console renewed his point , and the Tax Court would not allow the testimony.

Mr. Ianancone: Well , then, Your Honor, if there is grand jury information discussed in here , I would object.

The Court: "Okay , Mr. Console?

Mr. Console: "I would renew my point , Your Honor,

that the whole purpose of this hearing is to determine whether the Civil Division made use of the grand jury to produce its audit, and that if the Court refuses to hear or accept any documents that shows that the numbers are the result of the Grand Jury , the indictment , the audits that the criminal division came up with ,as compared to the ones that the civil division came up with , on the basis of grand jury material, then the Petitioner cannot be able to prove his point, his facts.

The Court: "All right , thank you, I just happened to peruse , quickly, the document , and I noticed , for instance , under paragraph 3(I), second paragraph , it says it was determined by interviews and grand jury testimony and then goes on to discusses things . So, this document **does appear to be the grand jury ,** and by virtue of that I'll sustain the objection".

When the Tax Court ruled that criminal division's memo and the attached criminal division audit could not be moved into evidence , Console attempted to show the **F.R.C.P. 6(e)** violation by testimony that the civil division agents had worked on the criminal division audit , but the Tax Court sustained the IRS objection;

Q: Were there other people that were cross-

assigned from the civil division to this case?

A: I don't -you're asking about a grand jury investigation , who was assigned. I don't think I should answer that.

Mr. Console: It's the point of the hearing, Your Honor. If he doesn't answer it , there's no hearing.

Mr. Ianancone : I will formally object. It's divulging information pursuant to a grand jury investigation.

The Court: Sustained.

All other questions of the agents to show Grand Jury material was used in the civil division audit in violation of **Rule 6(e)** were objected to , and the objections were sustained.

REASON FOR GRANTING WRIT OF CERTIORARI

There is a line of Supreme Court cases that prohibits the IRS from using Grand Jury materials for their civil audits. In **US vs. Sells Engineering 463 US 418 (1983)** The Court held that under **Fed.R.Crim.P. 6 (e)(c)(I)** attorneys for the civil division are not entitled to Grand Jury materials as of right, but rather must seek a court order upon a showing of particularized need. Moreover, this need must be compelling enough to demonstrate the disclosure out weighs any continued interest in **Grand Jury Secrecy, Id. At 427.** To hold otherwise, the Supreme Court stated, would encourage prosecutors to use the grand Jury as a means for gathering evidence for civil proceedings and would permit the government a form of broad EX-PARTE discovery unavailable to their adversaries under the **Federal Rules of Civil Procedure Id. At 427**.

Most importantly, the Supreme Court ruled in **Us vs. Baggott** that the IRS cannot legally obtain such an order under **Fed. R. Crim.P. 6(e)(C)(I)**. The Supreme Court in **US vs.**

Baggott held that the IRS audits are not Judicial Proceedings within the meaning of **Fed. Rule 6(e)**. Rather, the Court reasoned that since the IRS need never go to the Court to assess and to collect money owed, the process is extrajudicial one and therefore not within the scope of the rule. Therefore, the IRS can never avail itself of the **Rule 6(E)** exception to obtain Grand Jury materials.

The Third Circuit has over ruled the Supreme Court by ruling in favor of the IRS. The Third Circuit opinion has set up a **Classic Catch 22as follows:**

> A. The Supreme Court has ruled that the IRS cannot violate Grand Jury Secrecy in producing a civil audit.
> B. The only way a tax payer could prove that Grand Jury Secrecy has been violated is to put IRS documents into evidence and produce testimony from hostile IRS witnesses
> C. The Third Circuit now rules the IRS documents cannot be placed into evidence and the hostile IRS witnesses cannot be examined because it would violate Grand Jury Secrecy.
> D. Therefore the IRS can always violate Grand Jury Secrecy because a tax payer can never present proof they did.

Ironically the Third Circuit opinion states:

1. "We recognize that Console contends that the court erred in not holding an evidentiary hearing that would satisfy the case law applicable to his **Rule 6 (e)** claim. But in fact it did hold a hearing at which Console was free to produce evidence...."

2. "Neither of the two witnesses Console's called provided any support for any contention that there was a **Rule 6(E)** violation in this case".

The record shows that tax payer was not free to produce evidence on whether Grand Jury Secrecy had been violated . Tax payer 's best evidence came from the IRS itself. In 1996 the civil division had actually just photostated the criminal division audit of 1995 and passed it off as an independent civil division audit. However, the criminal division memo of 1995 and the attached criminal division audit based on Grand Jury testimony was not allowed into evidence. Therefore, the tax payer had no evidence to prove that the photostated copy of the criminal

division audit signed by the civil division agent in 1996 was not independently arrived at and was based on the criminal division audit based on Grand Jury testimony. This was tax payers' case in a nut shell.

The Tax court acknowledged on the record that **"The criminal division memo and the attached criminal division audit was based on Grand Jury testimony."** (Emph added) But inexplicitly the Tax Court would not allow it into evidence to prove that the civil division audit was merely a photostated copy of the same.

Console was also unable to question the IRS agents as to how they could arrive at these figures without violating Grand Jury Secrecy. The Tax Court allowed no questions on how the computation were arrived at in the civil division audit or what agents worked in these computations. The Court allowed no questions on whether civil agents were a part of the original audit , or how they could come to the same exact figures to the penny in each year if the civil audit was indeed

done independently, or how the civil division audit could be **physically the same photostated pages as the criminal audit** (emph added) if it was performed independently, etc. AGAIN , the Tax Court ruled that to answer such questions would violate Grand Jury Secrecy.

In the **Baggott and Sells** cases the United States Supreme Court prohibited prosecutor from using the Grand Jury as a means of gathering evidence for IRS civil proceedings as "it would permit the government a form of Broad ex-parte discovery". In this case , the Tax Court cited Grand Jury Secrecy to allow the IRS to violate Grand Jury Secrecy. This Third Circuit opinion gives the IRS its blessing to violate Grand Jury Secrecy.

The Supreme Court cases are very clear that the Grand Jury cannot be used as a discovery tool for the IRS. The Supreme Court denies the IRS this powerful tool because it is subject to abuse.

When the trial in the tax court was held in January 8,

2001 and February 21, 2001, the Judge allowed no questions of the criminal division agents and the civil division agents involved as to how their numbers were arrived at because he ruled that to answer such questions would "violate Grand Jury Secrecy". Further the tax court did not allow the criminal division agent's memo outlining how the criminal audit numbers were arrived at into evidence. Also, the Tax Court did not allow the attached criminal division audit itself into evidence.

By not allowing such testimony and by not allowing or accepting such documents into evidence the tax court has set up a **"classic catch 22"** situation. While acknowledging that the IRS could not use the Grand Jury as a discovery tool in formulating its notice of deficiency, they would not allow evidence to be produced that the IRS in fact had used the grand Jury materials in arriving at its notice of deficiency. Ironically citing no law to support their position the government objected to any such evidence on the basis that the evidence itself would violated Grand jury Secrecy. The court accepted this argument

setting-up the " **catch 22"**, whereby the IRS could always use grand jury material as a tool for discovery, because the tax payer could never challenge that use by producing documents or cross examination the agents involved, "BECAUSE IT WOULD VIOLATE GRAND JURY SECRECY". This is not what the Supreme Court has ruled in the **Baggott and Sells** cases.

The Tax payer attempted to submit the 1995 memo of the criminal division agent and the attached criminal division audit into evidence to show how the constructive dividends arrived at were based on Grand Jury testimony that the civil division was prohibited from using. The criminal division memo was supplied to the tax payer in 1995 while he , his attorney , and his tax consultant were negotiating a plea agreement with the IRS civil and criminal division and their attorneys. Tax payer agreed as part of his plea agreement to submit amended returns and pay taxes based on a n independent civil audit.

There never was an independent civil audit , but merely

a photostat of the criminal audit supplied at the a time for each of the four years in question. Basically the memo showed that the criminal audit was based on the grand jury and grand jury testimony. The independent civil audit , required by the plea agreement as well as the rule of the **Baggott and Sells** case, was never produced. The Civil division audit was based on the criminal division audit that was based on the grand jury testimony. There was no other plausible explanation of how the civil division had the same exact numbers. Because the memo showed that $272,623.50 of checks were allowed as legitimate business expenses. I t was impossible for the civil division in 1996 to independently allow the same $272,623.50 of business expenses spread out over 4 years.

When tax payer attempted to submit the memo into evidence and to question the revenue agent and the special agent as to how this miracle computation was arrived at without violating grand jury secrecy , the Tax Court used the prohibitions against violating grand jury secrecy to protect tax

payer against me, the tax payer.

CONCLUSION

This Third Circuit did not discuss the serious constitutional issues of **5th Amendment Due Process** involved in this case. It did not discuss how an evidentiary hearing could be held that would satisfy the rule of **Baggott and Sells** if no questions could be asked of the IRS witnesses and IRS documentary evidence introduced.

This Third Circuit opinion gives the IRS carte blanche to violate the **Fed.R.Crim.P. 6 (e)** protection of Grand Jury Secrecy and the **5th Amendment guarantee of due process**. This Third Circuit opinion will allow the IRS to continue to use the Grand Jury as a means for gathering evidence for its civil proceedings just as the United States Supreme Court feared. The Supreme Court should reverse The Third Circuit opinion and remand this case to the tax court so that a true evidentiary hearing can be held.

APPENDIX

Exhibit A T.C. Memo. 2001-232

UNITED STATES TAX COURT

RICHARD P. CONSOLE, Petitioner v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

Docket No. 14972-97. Filed September 5, 2001

Richard P. Console , pro se.

Steven W. Inanacone, for respondent.

MEMORANDUM OPINION

LARO, Judge: Respondent determined the following deficiencies, additions to tax, and accuracy-related penalty with respect to petitioner's Federal income taxes:

		Additional to Tax		Accuracy -related	
			Penalty		
Year	Deficiency	Sec. 6653(b)(1)(A	Sec.6661(a)	Sec.6653(b)	Sec.6663
1986	$104,596	$78,447	$26,149	-----	-----
1987	56,197	42, 148	14,049	-----	-----
1988	50,951	-------	12,737	$38,213	-----
1989	64,805	-----	-----	----	$48,604
1992	8,130	-----	------	-----	-----

Additionally, sec.6653(b) (1) (B) imposes an addition of 50 percent of the interest due on the deficiency.

Following a trial at which neither party presented any substantive evidence relating to respondent's determinations, we must decide whether petitioner is liable for those amounts. We hold he is. Section references are to the Internal Revenue Code in effect for the subject years, and Rule references are to the Tax Court Rules of Practice and Procedure . Petitioner resided in New Jersey when his petition was filed.

Background

On November 21, 2000 respondent moved the Court under Rule 91(f) to issue an order directing petitioner to show cause why proposed facts in evidence should not be accepted as established. Three days later, the Court granted respondent's

motion and ordered petitioner to file with Court by December 8, 2000 , a response under Rule 91 (f) (2) showing why the matters set forth in respondent's motion papers should not be deemed admitted for the purposes of this case. After petitioner failed to respond to the substance of our order, we ordered that the facts and evidence set forth in respondent's motion papers be deemed established for purposes of this case. Petitioner is considered under Rule 91 (f) to have stipulated to the following relevant facts:

9. During each of the taxable years 1986,1987,1988,1989, the petitioner was a shareholder and officer of Console, Wood, Curcio,P.C. a law firm incorporated under he laws of the state of New Jersey.

10. During the [sec] each of the taxable years 1986,1987,1988,1989, the petitioner followed a practice of bringing bills for his personal expenses to the law office for payment with checks drawn on the bank accounts of the law firm.

11. All checks in payment for these personal bills were coded by being marked with the letter "A".

12. Checks so coded were entered in the cash disbursement journal of the law firm and charged

to an account labeled "RPC".

13. The above practice was elicited from the petitioner during his testimony at a court appearance where he was on trial for insurance fraud.

14. Petitioner would meet with his account and petitioner would decide the nature of the item , business or personal, and would direct the accountant where to deduct the items determined to [be] business.

15. All items determined to be personal by the petitioner were charged to the petitioner as additional income and reported on his personal return.

16. Based on a review of the account's work papers, the law firm's cash disbursement journal, the cancelled checks coded with an "A", discussions with the accountant and the court testimony of the petitioner , there was an excess of personal expenses of petitioner paid by the law firm over the amounts reported as income by petitioner for the taxable years 1986,1987,1988,1989.

17. Petitioner's fraudulent omission of specific items of his income on hid income tax returns filed for the years 1986,1987,1988,1989 is a part of a four year pattern of intent to evade taxes.

18. The petitioner understated is taxable income on his income tax returns for the taxable years 1986,1987,1988,1989, in the amounts of $209,192.00,$145,966.00,$181,965.00 ans

$231,488.00 respectively.

20. The petitioner understated his income tax liabilities on his income tax returns for the taxables years 1986,1987,1988,1989, in the amounts of $104,596.00, $56,197.00 , $50,951.00 and $64,805.00,respectively.

21. A part of each deficiency in income tax for taxable years 1986,1987,1988,1989is due to fraud with the intent to evade taxes.

22. Richard P. Console , the petitioner herein, is the same person who was the defendant in the criminal case of United States of America v. Richard P.Console(District of New Jersey), Case Number 91-42(N.P.).

23. The respondent herein is a party in privity with the United States of America, the prosecuting party in the aforesaid criminal case in which the petitioner herein was the defendant .

24. The indictment filed on January 19, 1991, in said criminal case sets forth the following charge against the defendant , the petitioner herein:

THE GRAND JURY CHARGES :

COUNT ONE

On or about September 8, 1987, in the District of New Jersey and elsewhere.

RICHARD P. CONSOLE, Esq.,

The defendant , unlawfully, willfully and knowingly did attempt

to evade and defeat A large part of the income tax due and owing by himself to the United states of America for the calendar year 1986, by preparing and causing to be prepared, signing and causing to be signed and filing and causing to be filed with the internal revenue Service, a false and fraudulent 1986 United States Individual income Tax Return on behalf of himself, wherein it was stated that his taxable income for the said calendar year was $145,65.00 and that the income tax due and owing to the united states of America $57,018.00, whereas the defendant then and there well knew that his taxable income for the said calendar year was approximately $354,756.78 upon which taxable income there was then due and owing to the United States of America an income tax of approximately $161,613.89.

In violation of Title 26, United States Code, Section 7201, and Title 18, the United States Code, section2.***

25. The petitioner on August 22, 1995, entered a plea of guilty to the charge set forth against him in said indictment.

26. On September 6 1995, the United States District Court entered its judgement pursuant to said indictment.

27. Among the issue of fact determined int eh aforesaid criminal case was whether Richard P. Console , the defendant therein , and the petitioner herein, did in fact willfully file a false and fraudulent income tax return for the taxable year with the intent to evade and defeat income tax, and whether he did in fact by such means understate a part of the income tax due and owing by him to the United States of America for said year.

28. During the 1992 tax year, petitioner received $0.00 income on his purported Schedule C business and listed expenses of $563,871.00 including $554,861.00in attorneys fees.

29. The $554,861.00 in attorney's fees was paid for his criminal defense in the action described in paragraphs 22 through 26above and in a prior criminal matte described in paragraph 13 above.

Discussion

We address first whether petitioner is liable for the deficiencies and additions to tax under section 6661 (a) for substantial understatement . Respondent's determination is presumed correct, and petitioner bears the burden of proving it wrong . Rule 142 (a); Welch v. Helvering , 290 U.S. 111,115,(1933). Petitioner is deemed to have stipulated that he understated his income tax liabilities for 1986,1987,1988, 1989, in the amounts shown as deficiencies , and the record contains no evidence that would support a contrary finding. Nor does the record contain any evidence to prove wrong the deficiency for 1992 or the additions to tax under section6661(a). For returns due before January 1, 1990, a taxpayer whose return contains a substantial understatement of income tax is liable for an additional tax under section 6661 equal to 25 percent of the underpayment attributable to the understatement. Pallottini v. Commissioner, 90 T.C. 498, 500-503 (1988).

An understatement is substantial if it exceeds the greater of : (a) 10 percent of the tax required to be reported on the return or (b) $5,000. Sec. 6661 (b) (1) (A) (I) and (ii). An understatement is reduced to the extent : (1) The position taken resulting in the understatement was supported by substantial authority, or (2) the taxpayer adequately disclosed in the return, or in an attachment, relevant facts relating to his or her position. Sec. 6661 (b) (2) (B) (I) and (ii).

As to respondent's determination fo these deficiencies and additions thereto , petitioner relies solely on his argument that the notice of deficiency is invalid because, he alleges, respondent impermissibly used grand jury material during the audit underlying the notice of deficiency. At trial , petitioner called two witnesses to attempt to prove his allegation, The first witness was a special agent in respondent's criminal investigation division. He was involved with the petitioner 's grand Jury investigation and testified that he had prepared reports and computations of petitioner's tax liabilities exclusively for use in the grand jury proceedings. He also testified that he was unaware that any of those reports or computations were used by respondent in the course of the audit underlying the notice of deficiency. The second witness , one of the respondent's revenue agents, provided no testimony that would support petitioner's allegation.

On the record before us, we are unpersuaded that respondent relied on any grand jury material in the formulation of the notice of deficiency. We hold that the notice of deficiency is valid. Accordingly, we sustain respondent's determination as to the deficiencies. and the additions to tax under section 6661(a).

We turn next to respondent's determination that petitioner is liable for the Additions to tax for fraud under section 6653 (b) and an accuracy-related penalty for fraud under section 6663. Respondent must prove this determination by clear and convincing evidence. Sec. 7454(a) ; Rule 142 (b) ; Castillo v. commissioner, 84 T.C.405, 408, (1985); Rowlee v. Commissioner , 80 T.C. 1111, 1113 (1983). An addition to tax (or accuracy -related penalty) for fraud is a civil sanction "provided primarily as a safeguard for the protection of the revenue and to reimburse the government for the heavy expense of investigation and the loss resulting from the tax payer's fraud". Helvering v. Mitchell, 303 U.S. 391, 401 (1983). Fraud denotes intentional wrongdoing on the part of the taxpayer with the specif purpose of evading a tax known or believed to be

owing. Petzoldt v. Commissioner , 92 T.C. 661, 698,(1989). Fraud is shown by proof that the taxpayer intended to conceal , mislead , or otherwise prevent the collection of his or her taxes and that there is an underpayment of tax. Spies v. United States , 317 U.S. 492, 499,(1943) ; Stoltzfus v.United States , 398 F. 2d 1002, 1005, (3rd Cir. 1968) ; Webb v. Commissioner , 394 F. 2d 366, 377,(5 th Cir. 1968) ; affg. T.C. Memo . 1966-81; Rowlee v. Commissioner, supra at 1123. Thus, in order to sustain his burden as to fraud , respondent must prove that " (1) Petitioner underpaid his taxes for the relevant years, and, (20some part of each underpayment was due to fraud. 2

It is well settled in this Court that the Commissioner may establish fraud by relying upon matters deemed admitted under Rule 90. Marshall v. Commissioner, 85 T.C. 267 (1985) ; Morrison v. Commissioner , 81 T.C. 6444, 651 (1983); Doncaster v. Commissioner, 77 T.C. 334, 336, (1981). The Commissioner may also establish fraud by relying on facts deemed to be stipulated under Rule 91 (f). Ambroselli v. Commissioner , T.C. memo . 1999-158. On the basis of our review on the record , we conclude that respondent has clearly and convincingly proven both prongs of the two-part test for fraud . Petitioner is deemed under Rule 91(f) to have stipulated that " a part of each deficiency for 1986, 1987, 1988, and 1989, was due to fraud with the intent to evade taxes". As to 1986, petitioner is also have deemed to have stipulated that he plead guilty to a violation of section 7201. Petitioner's conviction of criminal tax evasion for 1986 under section 7201 collaterally estopps him from denying that his payment of income tax for 1986 was due to fraud purposes of section 6653(b). See, e.g. Johnson v. Sawyer , 47 F 3d. 716,722(5th Cir.1995);

If respondent establishes that some part of the underpayment for a year is due to fraud , all of the underpayment is deemed attributable to fraud unless petitioner proves otherwise. See se. 6653(b)(2),as in effect for 1986 through 1988; sec. 6663(b), as in effect for 1989.

Gray v. Commissioner , 708 F 2d. 243 (6th Cir.1983), affg. T.C. Memo. 1981-1; Castillo v. Commissioner , supra at 409-410; Brooks v. Commissioner , 82 T.C. 413, 431 (1984), affd. without published opinion 772 F. 2d 910(9th Cir. 1985); Amos v. Commissioner , 43 T.C. 50 (1964), affd. 360 F. 2d 358 (4th Cir. 1965). We sustain respondent's determination of the additions to tax and the accuracy related penalty for fraud .

Decision will be entered fro respondent.

Exhibit B

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 01-428 and 02-3375

RICHARD P. CONSOLE, SR.,
Appellant

V.

COMMISSIONER OF INTERNAL REVENUE

On Appeal from the united States Tax Court
(Tax Court No. 97-14972)
Tax Court Judge: Honorable David Laro

Submitted United Third Circuit LAR 34.1(a)
July 8, 2003

BEFORE: NYGAARD, SMITH, AND GREENBERG,
Circuit Judges

(Filed July 9, 2003)

OPINION

GREENBERG, Circuit Judge.

Richard P. Console appeals from a decision and a corrected decision of the United States Tax Court in favor of the appellee, the Commissioner of Internal Revenue respectively entered on September 7, 2001, and May 23, 2002. We have consolidated the appeals for briefing and disposition and will affirm. 1

In 1991 a grand jury indicted Console for attempting to evade income taxes for the years 1986 through 1989by fraudulently understating his taxable income. 2 In particular the indictment charged that Console understated his taxable income by the following amounts: $209,192 for 1986, $145,196 for 1987, $181,965 for 19888, $231,448 for 1989.

On August 22, 1995,pursuant to a plea agreement, Console pleaded guilty to the charges relating to his 1986 tax year in exchange for a dismissal of all the other counts of the indictment. The agreement required Console to file amended tax returns for the taxable years 1986-1989, "if necessary, after a civil audit"; to provide documentation in support of the returns; to pay all taxes and penalties owed on those returns; to cooperate fully with the IRS; and to comply with the tax laws of the United States.

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1 Console filed two appeals because after his original appeal we remanded the case to the Tax Court to enter a corrected decision which it did. Then Console appealed again.

2 during these years Console was a shareholder and a n officer of a law firm incorporated in New Jersey and followed a practice of bringing bills for his personal expenses to the law office for payment. Checks were drawn on the bank accounts of the law firm and marked with the letter"A". These coded checks were entered into the law firm's cash disbursement- journal and charged to an account labeled "RPC". Console subsequently met with his accountant and determined the nature of them ,i.e., business or personal, and directed the accountant where to deduct items determined to be business items. Items Console determined to be personal were charged to him as additional income and reported on his individual income tax return.

In 1997, following a civil audit , the IRS issued a notice of deficiency, determining deficiencies in Console' income tax for the taxable years 1986 through 1989 as well as for 1992, and imposing penalties and additions to his liability. Console thereafter filed a petition in the tax court contesting the deficiencies and the penalties and additions to tax. Console's position stated that he disagrees with the notice of deficiency because:

> 1)All [expenses claimed as deductions including those disallowed] were Business expenses of the corporation.
>
> 2)From 1986-91 [he] lent the corporation [$]304,000 which was never repaid to [him]. This was in excess of the $284,679 in dispute.
>
> 3)As an attorney, the criminal charges were directly connected with [his] profession and the legal fees were paid so [he] might continue to produce income.

App. At 13.

Subsequently, Console filed a motion for an order to show cause in his criminal tax case, even though he had already pleaded guilty in that case, claiming that the IRS violated Fed.Crim.P. 6(e), which protects the secrecy of grand jury proceedings, by improperly using grand jury materials in computing his tax liability. Console based his argument on assertion that the amounts in the notice of deficiency were identical to those in the indictment, as well as to those an IRS agent provided in the criminal case. The district court dismissed the application as "not justiciable" in the criminal case. Console appeared but we affirmed in an opinion and judgement filed April 25,2000, indicating in our opinion that"[t]he fact that in the notice of deficiency are the same as the amounts calculated in the criminal case does not, without more, demonstrate the former were determined in violation of Rule 6(e)".

While the foregoing district court proceedings and the

appeal to this court were pending , the Ta x Court suspended the proceeding before it. On October 20, 2000, after the tax court proceedings had been reactivated, the IRS served its second set of requests for admissions on Console. 3 On November 18, 2000, Console filed a response, in which he asserted that he neither could admit or deny anything in the requests for admissions because he had filed a petition for writ of certiorari which then was pending and that "[t]o rule that these requests must be answered at this time would be [to] usurp jurisdiction from the Supreme Court in this case". App. At 370. As in the district court proceeding, he alleged that the notice of deficiency was based on grand jury materials in violation of Rule 6(e). The Supreme Court subsequently denied the petition for certiorari ,

On October 27, 2000, the IRS served a second set of interrogatories on Console. These interrogatories listed a number of checks written from 1986 through 1989, and requested that Console describe the nature of the expenditure and the business purpose for each check that he did not admit as personal. Console did not respond to the second set of interrogatories, ad, accordingly, on November 17m, 2000, the IRS filed a motion to compel. In his sole substantive response to the interrogatories, Console submitted a report prepared by an outside consultant dated July 5, 1995, which was assigned various amounts tot purported expense categories but without the specificity required for the response. The response did not identify interrogatories Console was addressing, and he did not adopt specifically in the report. The Tax Court granted the request in part.

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3 In June 1999, while the case was in suspension, the IRS served interrogatories and a request for admissions upon Console. When Console failed properly to respond to the interrogatories , the Commissioner filed a motion to compel. The Tax Court denied the motion in as much as the case had been continued.

On December 12, 2000 the IRS filed a motion seeking to

have the court review the sufficiency of Console's responses to its request for admissions. The Ta Court granted the request and determined that Console had properly answered only five of the IRS' request for admissions. Accordingly, the Tax Court held that the facts the IRS set forth in its requests for admissions and the second request for admissions were deemed to have been admitted to the extent not properly answered.

On November 21, 2000 , the IRS filed a motion seeking an order to show cause why proposed facts in evidence should not be accepted as established . The motion stated the IRS had mailed proposed stipulations of fact to Console on January 5, 1999, January 8, 1999, and April 16, 1999. The proposed stipulations were attached to the motion, along with the exhibits, and a statement as to the source or the location of the evidence on which the IRS based each fact in the stipulation.

The court granted the order to show cause on November 24 , 2000, and ordered Console to file , by December8, 2000, a response showing why the matters set forth in the IRS motion papers should not be deemed stipulated for purposes of this case, pursuant to Tax Court Rule 91(f)(3). Console failed to file any response within the time the court specified and thus , on February 9, 2001, the court issued an order making absolute its order of November 24, 2000. Accordingly, the facts and evidence in the IRS's motion papers were deemed established for the case.

Following the trial the court on the basis of stipulations issued a memorandum opinion upholding the deficiency determinations and additions to the tax. The court rejected Console's argument that the Commissioner improperly used grand jury material during the audit underlying the notice of deficiency. The court found that neither of Console's witnesses provided any testimony or other evidence to support this claim, and accordingly, entered a decision that there were deficiencies and additions to the tax as set forth in the notice of deficiency.

Console filed a timely appeal. He contends that the tax court error red in its February 9, 2201 ruling deeming certain

matters admitted and stipulated for the purposes of this case. He also contends, as he did in the criminal case, that the IRS illegally used grand jury information in violation of Rule 6(e) when calculating the notice of deficiency. In this regard, he argues that the tax court errerd in not holding an evidentiary hearing on his contention.

We have jurisdiction to I.R.C. 7482(a)(l). We review the Tax court's rulings regarding the admissions of evidence and stipulations-of-facts for abuse of discretion. See Old Chief v. United States519 U.S. 172,174n.l., 117 S.Ct. 644, 647n.l.(1997) (standard of review applicable to the evidentiary rulings of the trial court is abuse of discretion). We review factual findings regarding the IRS' determinations for clear error, PNC Bancorp,Inc. V. Commissioner, 212 F.3d. 822,827(3rd Cir.2000);ACM P'ship v. Commissioner,157 F. 3d 231,245(3rd Cir.1998); Pleasant Summit Land Corp. V. Commissioner, 863 F.2d 263, 268 (3rd Cir. 1988).

A. Stipulations of Fact

Console's arguments fail. The Tax Court acted well within its discretion in adopting the admissions and stipulations of fact. After Console demonstrated his ongoing and repeated failure to cooperate with the IRS 's attempts at discovery and with its attempts to enter into stipulations of fact , the court issued orders holding that the requests s et forth in the IRS' request for admissions were deemed admitted to the extent not properly answered and deeming the facts and evidence in the IRS's motion to be established for the case. That holding was consistent with Tax Court Rule 91.

Rule 91 governs stipulations of the facts and Rule 91 (a) provides that the parties are required to stipulate to the fullest extent possible to "all matters not privileged which are relevant to the pending case, regardless of whether such matters involve fact or opinion or application to law to fact." If a party fails to cooperate as required by the rule, the party proposing a stipulation may file a motion to compel a stipulation, and, if there

is not an adequate response , the matter in the proposal will be deemed stipulated. See Rule 91 (f); Miller v. Commissioner , 654F.2d 519,520-21(8th Cir, 1981), As we have noted, "[s]tipulations pursuant to Tax Court Rule 91 have been described as the bedrock of Tax Court practice and [are] considered largely responsible for the courts' ability to keep current with the thousands of cases docketed each year." Merino v. Commissioner , 196F.3d147,151,n.6(3rd Cir.1999)(citation and internal quotation marks omitted). Given the importance of stipulations, the Tax Court has the discretion to sanction parties not cooperating within the stipulation process, either by dismissing the case for failure to prosecute or deeming matters to be stipulated for purposes of the case. See Larson v. Commissioner , 765 F.2d 939,941(9th Cir.1985); Miller v. Commissioner ,654 F.2d at 521.

B. Misuse of Grand Jury Information

The Tax Court also correctly held that Console failed to

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4 To the extent that Console challenge as the numerical accuracy of the deficiency determination, he does not meet his burden of proof. In this case we afford the government's deficiency assessment a presumption of correctness and will not look behind the Commissioner ' determination. See Anastasato v. Commissioner, 794 F.2d 884,886(3rd Cir. 1986). While we recognize that if a taxpayer rebuts the presumption of correctness with credible and relevant evidence sufficient to establish that the determination was erroneous, the procedural burden of going forward with the evidence shifts to the Commissioner, See Sullivan v. United States , 618 F.2d 1001,1008(3rd Cir.1980), Console has not succeeded in rebutting the presumption. Indeed, our review of the record reveals that Console did not attempt to introduce evidence that would cast any doubt on the correctness on the notice of deficiency. While the burden of proof may be shifted to the Commissioner in certain circumstances for audits conducted after July 22, 1998, See Neonatrology Associates, P.A. v. Commissioner , 299 F.3d 221,228 n.6 (3rd Cir.2002), this modification of the placement of the burden of proof is inapplicable here.

demonstrate that the IRS improperly used Grand Jury information in issuing the notice of deficiency. In his brief, Console argues that in as much as the figures the IRS set forth in its notice of deficiency are identical to those in the indictment, the IRS must have utilized confidential information in violation of Rule 6(e), which provides for the confidentiality of matters occurring before a Grand Jury. 4 We reject this argument. As we noted in the appeal Console's criminal case ,the indictment is public document and thus the figures contained in it are available to the IRS without violating Rule 6(e). Moreover there is no prohibitions on the use of public documents in the issuance of a notice of deficiency. See e.g. Sisk v. Commissioner , 791 F.2d 58,60 (6th Cir. 1986) (matters of public record are not [protected by the grand Jury secrecy). Thus, it hardly could have been a violation of Rule 6(e) when the notice of deficiency contained the same figures as appeared in the indictment as the information was available independently from any confidential information before the grand Jury.

Of course , the fact that the figures in the notice of deficiency could be obtained without a violation of Rule 6(e) does not necessarily establish that there was no such violation. But neither of the two witnesses Console called provided any support for hi contention that there was a Rule 6(e) violation in this case. Furthermore, he did not submit any other evidence of improper use usage of grand jury material ; accordingly we cannot say the Tax Court erred in its factual finding regarding the IRS' deficiency determination. We recognize that Console contends that the court erred "in not holding an evidentiary hearing that would satisfy" the case law applicable to his Rule 6 (e) claim. But, in fact , it did hold a hearing at which Console was free to produce evidence on the point. Then the Court made an adjudication on the basis of the record developed. In the circumstances , the court proceeded appropriately.

For the foregoing reasons we affirm the Tax Court's decisions

Morton I,Greenberg /Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos.01-4281 and 02-3375

RICHARD P. CONSOLE, SR.,

Appellant

V.

COMMISSIONER OF INTERNAL REVENUE

On Appeal from the United States Tax Court
(Tax Ct. No. 97-14972)
Tax Court Judge:Honorable David Laro

Submitted United Third Circuit LAR 34.1(a)
July 5, 2003

BEFORE:NYGAARD,SMITH,GREENBERG,
Circuit Judges

This cause came on to be considered on the record from the United States Tax Court and was submitted under Third Circuit LAR 34.1(a) on July 8, 2003. On consideration whereof , it is now hereby

ORDERED and ADJUDGED by this Court that the decisions of the Tax Court are affirmed.
Costs taxed against appellant.

ATTEST:

Marcia M. Waldron
Clerk

Dated ; July 9, 2003

Exhibit C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 01-4218 and 02-3375

RICHARD P. CONSOLE, SR.,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE

On Appeal from the United States Tax Court
(Tax Ct. No. 97-14972)

Submitted United Third Circuit LAR 34.1 (a)
July 8,2003

SUR PETITION FOR REHEARING

BEFORE: SCIRICA, Chief Judge, SLOVITER, NYGAARD,ALITO, ROTH, MCKEE, RENDELL,BARRY, AMBRO, FUENTES,SMITH, and GREENBERG, Circuit Judges

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The Petition for rehearing filed by appellant, Richard P.

Console, Sr., in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing , and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc , the petition for rehearing is denied. Judge Greenberg's vote is ;limited to denying rehearing before the original panel.

BY THE COURT:

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Circuit Judge

DATED: SEP 12 2003

Exhibit D

UNITED STATES TAX COURT

Washington, DC 20217

RICHARD P. CONSOLE,

Petitioner,

v. Docket No. 14972-97

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER AND DECISION

This case is before the court upon remand from the court of Appeals for the Third Circuit. Pursuant to our January 12, 2002, letter to the Court of Appeals for the Third Circuit , that court remanded the case to us to correct a clerical error or omission in our decision entered September 7, 2001. Whereas we had stated in our underlying Memorandum Opinion (T.C. Memo. 2001-232) that petitioner was liable for additions to his 1986 and 1987 taxes under section 6653 (b) (1) (B), I.R.C., our decision did not reflect that statement. In order to reflect the foregoing, it

is

ORDERED AND DECIDED that there are deficiencies in income tax, additions thereto, and penalties due from petitioner as follows:

	Additions to Tax	
Year	Deficiency	Sec.6653(b)(1)(A)
1986	$104,596.	$78,447.
Sec.6661(a)	Sec.6653(b)	Penalty, Sec.6663
$26,149	----------	----------
Year	Deficiency	Sec.6653(b)(1)(A)
1987	56,197	42,148
Sec.6661(a)	Sec.6653(b)	Penalty, Sec.6663
14,049	----------	----------
Year	Deficiency	Sec. 6653(b)(1)(A)
1988	50,951	----------
Sec.6661(a)	Sec.6653(b)	Penalty, Sec.6663
12,737	38,213	----------

Year	Deficiency	Sec.6653(b)(1(A)
1989	64,805	----------
Sec.6661(a)	Sec.6653(b)	Penalty, Sec.6663
----------	----------	48,604
Year	Deficiency	Sec.6653(b)(1)(A)
1992	8,130	----------
Sec.6661(a)	Sec.6653(b)	Penalty, Sec.6663
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Petitioner also is liable under section 6653(b)(1)(B), I.R.C., for additions to his 1986 and 1987 taxes in amounts equal to 50 percent of the interest due on the respective year's deficiency.

It is further

ORDERED that the Clerk of the Court shall serve each party with the referenced January 11, 2002 , letter, a copy of which is attached hereto.

(Signed) David Laro

David Laro,Judge

ENTERED: MAY 23 2002